IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, and the UNITED STATES NATIONAL BANK OF CENTRALIA,
Appellants,

vs.

ANNA E. MCCORMICK,
Appellee.

No. 2653

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASINGTON, SOUTHERN DIVISION

APPELLEE'S BRIEF.

ELMER M. HAYDEN,
MAURICE A. LANGHORNE
FREDERIC D. METZGER
Solicitors for Appellee.

Allen & Lamborn Printing Co., Tacoma, Wash.

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STATEMENT OF FACTS

The facts in this case are few and simple, easily understood, and we trust not difficult of solution. Shortly stated they are as follows:

Some few days prior to August 22, 1913, Mrs. McCormick, the appellee, purchased from the United States National Bank of Centralia a large number of school warrants, all issued by School District No. 9, of Lewis County, Washington. She paid the bank therefor the sum of $15,506.18. On August 22nd, 1913, appellee left these warrants with the bank for collection, and the bank thereupon gave her receipt, which, omitting the number and amount of the warrant described therein, reads as follows:

> "Tacoma, Wash., Aug. 22, 1913.
>
> Received from Mrs. Anna E. McCormick for collection the following warrants, issued by School District No. 9, Lewis County, Washington * * *
>
> THE UNITED STATES NATIONAL BANK,
> Centralia, Wash.
> C. S. GILCHRIST, *Vice-President.*"

(Tr. pp. 11-16)

On January 31, 1914, the school district issued a call for the presentation for payment of warrants Nos. 3331, 3297, 3298 and 3299, aggregating with interest $1659.54. On February 4th, 1914, these identical warrants were by the United States National Bank of Centralia presented to the county treasurer of Lewis county, who is by the statute of the state of Washington made *ex officio* treasurer of all school districts, for payment, and the county treasurer, in payment of these warrants, issued his check to the United States National Bank of Centralia, drawn on Coffman, Dobson & Company, Bankers, at Chehalis, for $1747.04—the check including some other small items which caused it to total the amount named. Instead of remitting to the appellee the amount collected on the warants the United States National Bank forwarded the check for $1747.04 to Coffman, Dobson & Company, Bankers, at Chehalis, Washington, on whom it was drawn, with instructions to deposit the amount to its credit, which instructions were observed by Coffman, Dobson & Company, who gave the Centralia bank credit for the amount of the check, and the Centralia bank charged Coffman, Dobson & Company with a like amount. These two banks carried reciprocal accounts, and after this check was deposited, the United States National Bank of Centralia had to its credit with Coffman, Dobson & Company the sum of $5,046.20 (Tr. pp. 46-47).

On April 11, 1914, School District No. 9 issued another call for outstanding warrants of the district, which call included all of the warrants owned by appellee and left with the United States National Bank of Centralia for collection. On April 14, 1914, this bank presented the remainder of said warrants to

the county treasurer for payment, and that officer paid the same by giving to the United States National Bank checks as follows:

1 check for $3598.00, drawn on Security State Bank of Chehalis.

1 check for $1765.06, drawn on Security State Bank of Chehalis.

1 check for $4912.41, drawn on Chehalis National Bank, of Chehalis.

1 check for $4061.77, drawn on Chehalis National Bank, of Chehalis.

All these checks were dated April 14th, 1914. The bank disposed of appellee's moneys represented by the checks in the following manner: The two checks, aggregating $5363.06, drawn in favor of the United States National Bank on the Security State Bank were deposited with the Security State Bank and credit received by the Centralia bank therefor. That at the time of this deposit the Centralia bank was overdrawn with the Security State Bank in an amount in excess of the deposit. The remaining checks, amounting to $8974.18, were on April 15, 1914, deposited by the Centralia bank with the Bank of California, of Tacoma. After this deposit was made there was a balance with the Bank of California of Tacoma to the credit of the United States National Bank amounting to $19,988.02. The Bank of California was a reserve agent and correspondent at Tacoma of the Centralia bank. On April 14, 1914, the United States National Bank of Centralia had exhausted its credit balance with Coffman, Dobson & Company of Chehalis, and on April 27, 1914, its account with the Bank of California of Tacoma was also overdrawn, but on September 19, 1914, the date when the United States National Bank of Centralia

closed its doors and went into the hands of a receiver, it had a balance in its favor with the Bank of California of $1585.36. (Tr. p. 35).

The United States National Bank of Centralia closed its doors on September 21, 1914, and a receiver was placed in charge of its assets. At the time this bank closed its doors there was actual cash on hand of $27,899.81, and there were cash items of $4,539.63, and a balance with banks who were reserve agents amounting to $45,613.94, and a balance with banks not reserve agents of $21,486.16, making a total of $90,627.96. (Tr. p. 53)

On February 14, 1914, the date when the Centralia Bank deposited with the Bank of Coffman, Dobson & Company the check of $1747.04, of which amount the sum of $1548.36 belonged to appellee it had:

Actual cash in its vaults	$ 66,381.40
Cash items	4,654.85
Balance with reserve agents	50,295.18
Balance with non-reserve agents	17,404.98
Total	$138,736.41

(Tr. p 67)

On April 15, 1914, the date when the Centralia bank deposited with the Security State Bank of Chehalis and the Bank of California, of Tacoma, the balance of appellee's funds realized from the payment of her warrants, it had:

Actual cash in its vaults	$ 53,366.70
Cash items	10,787.02
Balance with reserve agents	80,911.78
Balance with non-reserve agents	32,935.91
Total	$178,011.41

(Tr. pp 67-68)

Between February 14, 1914, and September 19, 1914, the latter date being the date when the bank closed, the lowest amount of the above aggregate sums, that is actual cash, cash items, balances with reserve agents, balances with banks not reserve agents, was $90,627.96, distributed as follows:

Actual cash	$ 22,464.30
Cash items	1,063.56
Balance with reserve agents	45,613.94
Balance with non-reserve agents	21,486.16

(Tr. pp. 52-53)

After cashing the warrants belonging to appellee, the officers of the United States National Bank of Centralia, deliberately concealed that fact and told appellee that her warrants had not been paid. (Tr. pp. 53-54)

Since the bank closed its doors its receivers have collected from persons owing the bank approximately $200,000.00. (Tr. p. 68).

Appellee commenced this suit against the bank and its receiver to impress a trust in her favor upon its assets to the extent of the moneys received by it belonging to her. The lower court decreed a preference to the extent of $10,054.69 only. The opinion of Judge Cushman, who tried the case in the lower court, has never been published in the Federal Reporter. It states the facts so clearly and applies the law so concisely that we take the liberty of making it a part of our statement. The opinion in full is as follows:

"Cushman, District Judge.

"This is a suit to establish a trust and right to payment in preference to general creditors out

of money coming into the hands of the receiver of the United States National Bank of Centralia, Washington.

"The plaintiff purchased certain school warrants of the United States National Bank and later returned them to that bank for collection, the bank giving plaintiff the following receipt:

> 'Tacoma, Wash., Aug. 22, 1913.
>
> 'Received from Mrs. Anna E. McCormick for collection the following warants issued by School District No. 9, Lewis County, Washington * * * *
>
> 'The United States National Bank,
> Centralia, Wash.
> C. S. Gilchrist, Vice-President.'

"The warrants were later paid by the county treasurer, who gave the United States National Bank checks as follows:

1 Check, $3598.00, drawn on Security State Bank of Chehalis,

1 check, $1765.06, drawn on Security State Bank of Chehalis.
Both checks being dated April 14, 1914;

1 check, $4912.41, drawn on Chehalis National Bank.

1 check, $4061.77, drawn on Chehalis National Bank.
Both of above checks being dated April 14, 1914.

1 check, $1747.04, drawn on Coffman, Dobson & Co., Bankers, of Chehalis, Washington, and dated February 4, 1914.

"The bank did not pay the money over to plaintiff, nor advise her of its collection. Long after the collection of these warrants and shortly before the bank's failure, upon inquiry at the bank by the

plaintiff's agent, he was informed that the warrants had not been paid.

"The checks received by the bank were deposited as follows:

"The check dated February 4, 1914, on Coffman, Dobson & Co., Bankers, of Chehalis, Washington, for $1747.04 was, with other checks, deposited in that bank by the United States National Bank on February 6th, at which time there was a balance in that bank in favor of the United States National Bank, including this item, of over $5000.

"On February 7th, after the deposit of plaintiff's check, there was a balance of $6,053.43 with Coffman, Dobson & Co., Bankers, to the credit of the United States National Bank. This credit balance, on February 7th, was reduced in the ordinary course of dealing between the banks until upon the 14th of April, the account was overdrawn.

"Two checks—dated April 14, 1914, one for $3598.00 and the other for $1765.06—amounting in all to $5363.06, were deposited April 15, 1914, with the Security State Bank of Chehalis. The United States National Bank was overdrawn with the Security State Bank of Chehalis at the time of the deposit considerably more than the amount of the deposit, which deposit was credited on such overdraft.

"The remaining checks—dated April 14, 1914, one for $4912.41 and the other for $4061.77—amounting to $8974.18 were, on April 15, 1914, deposited with the Bank of California at Tacoma. As in the case with Coffman, Dobson & Co., Bankers, prior to, and at the time of this deposit, there was a balance with the Bank of California to the credit of the United States National Bank amounting at that time, $19,988.02. Withdrawals by bank drafts and checks in the usual course of dealing with a correspondent bank were made the same day, reducing the balance in its favor on the 17th to

$8,444.08. This amount was further reduced so that on the 27th day of April, the account was overdrawn.

"The Bank of California was a reserve agent and correspondent at Tacoma of the United States National Bank of Centralia, and sent its collections in the Centralia section to the United States National Bank for collection and credit.

"Coffman, Dobson & Co., Bankers, was a Chehalis bank, while the United States National Bank was a Centralia bank, and each bank, in the ordinary course of its banking business, received and cashed the checks of the other. The same course was followed by the Security State Bank, also a Chehalis bank, and the United States National Bank. The towns of Chehalis and Centralia are in the same county, being five or six miles apart.

"The lowest amount of cash held in the vaults of the United States National Bank on any date subsequent to the payment of these warrants and prior to the taking over of the assets by the receiver was on September 17, 1914, and amounted to $23,527.86. The total cash at that time in the bank's vaults and with reserve agents and other correspondent banks not reserve agents was $90,-627.96. At the time the bank closed, September 19th, the cash on hand exceeded the above amount, the amount with reserve agents and other banks being substantially the same.

"Under the foregoing facts, it is clear that the bank did not become merely the debtor of the plaintiff, but that a trust is established in her favor upon such proceeds of the check as can be traced into the fund coming into the receiver's hands. This case, in its essential features—except as to the deposit with the Security State Bank of Chehalis—cannot be distinguished from the *Merchants National Bank v. School District No.* 8 (94 Fed. 704), wherein it was said:

'On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for $13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. It is not material in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston, and that upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay up the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of $13,056 and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund subject to disbursement only upon the order of the school district. In *Bank v. Armstrong*, 148 U. S. 58, 13 Sup. Ct. 533, the court quoted

with approval the language of Mr. Justice Miller in *Marine Bank vs. Fulton Bank,* 2 Wall, 252, in which it was said:

> 'All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand.'' (at pp. 707 and 708).

'The later decisions of the same court: In re *J. M. Acheson Co.* (170 Fed. 427) and in re *Dorr* (196 Fed. 292), in no way modify the ruling in the *Merchants National Bank v. School District No.* 8; nor is the case of *Schuyler v. Littlefield* (232 U. S. 707) in any way at variance with that decision.'

"In *Schuyler v. Littlefield* (232 U. S. 707) the court was dealing with a bank deposit of a broker that was shown by the evidence to have been completely exhausted, dissipating the trust fund. The case now under consideration is one of a bank and the funds deposited by it with its correspondents and reserve agents, together with the actual money in its vaults at the time of the unlawful conversion of the plaintiff's checks and at the time of its failure which will be treated as one fund.

"In the ordinary dealing between the United States National Bank and its correspondents, including Coffman, Dobson & Co., Bankers, and the Security State Bank, the presumption is that as the balance to its favor in these banks was re-

duced, it found its way either into the vaults of the United States National Bank or into its reserves with other banks. With the course of dealing pursued in this case, it is as certain that the cash fund coming into the receiver's hands from the vaults of the bank and from its reserve agents and corespondents was increased by the deposits made with the Bank of California and Coffman, Dobson & Co., Bankers, as it would be if the checks had been deposited with the United States Bank, itself.

"The grounds for presuming that thereafter the United States National Bank, in expending money, expended its own money and not that from the proceeds of these checks are likewise as strong in the former as in the latter case.

"When the methods in which exchanges and clearances between a bank and its correspondents of money tokens are considered, it is apparent that there is an equal, if not greater defficulty—if unaided by presumption, in tracing the proceeds from the deposits of checks made in the manner followed in this case than there would be in undertaking to trace coin deposited.

"In the foregoing quotation from *Merchants National Bank v. School District No.* 8, the court says:

> 'The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received.'

This is a recognition of the prerequisite that, before a trust will be impressed upon a fund, it must be shown with reasonable certainty that the fund has been increased by the trust deposit.

"In the present case it is clear that, so far as the deposit with the Security State Bank of Chehalis is concerned, there can be no such certainty. It may be that such fund was increased by prevent-

ing its being depleted as it otherwise would have been, but for that deposit, by other expenditures from the fund; but there is an equal chance that it only added to the general assets of the company by preventing the curtailing of loans or discounts, or in other ways.

"Preference will be decreed plaintiff so far as the amount deposited in the Bank of California and Coffman, Dobson & Co., Bankers, is concerned. Plaintiff is not entitled to the full amount of these deposits, for one warrant of $86.50, included in the Coffman, Dobson & Co., Bankers' check was a warrant belonging to the United States National Bank and not to plaintiff. A further deduction will be made on account of interest accrued on the warrants at the date of sale to plaintiff, as such accrued interest was the property of the United States National Bank.

"The claim of preference so far as the Security State Bank is concerned is denied.

"Defendant has shown that there are other suits for the establishment of preference pending against the receiver and has asked that, in the event plaintiff is decreed a preference, that it be only such proportion thereof as plaintiff would be entitled to out of the fund actually in the bank's vaults at the time of the bank's failure, ratably with plaintiffs in other suits who shall prevail.

"The plaintiffs in these other suits are not parties to the present cause. Should the fund prove insufficient to answer all established preferences, all prevailing plaintiffs would have the right to be heard as to rights of preference among themselves. 39 Cly 540 and 541, note 38.

"Decree may be entered accordingly."

ARGUMENT

This brief is being prepared prior to the service of appellant's brief, and we can only surmise what objections they will urge in their endeavor to procure a reversal of the decree entered by the lower court. We will assume that their position in this court will not be different from what it was in the lower court. In a memorandum brief filed with Judge Cushman, counsel for the receiver thus summarize their contentions. We quote therefrom as follows:

> "We shall attempt to discuss very briefly in the following memorandum but one question, namely: Did the United States National Bank actually receive any money as the proceeds of Mrs. McCormick's warrants? The pertinent facts may be state briefly as follows:
>
> 1. As to the Coffman-Dobson transaction: The county treasurer's check of February 4th, on Coffman, Dobson & Co., represented approximately $1500 of Mrs. McCormick's warrants. This check, with others, was sent to them on February 6th. At that time Coffman, Dobson & Co. owed the United States National Bank, including this item, approximately $5000.00, $1500.00 of which belonged to Mrs. McCormick. (We are, of course, assuming merely for the purpose of this argument that the court shall find that a trust relation was created originally, and not merely one of debtor and creditor.) The testimony shows that Coffman, Dobson & Co. cashed checks drawn on the United States National Bank by the latter's depositors; in other words, that Coffman, Dobson & Co. paid certain of the United States National Bank's debts. These checks were of course transmitted to the United States National and charged to the various depositors' accounts, and the checks returned to the depositors. The fact that the United States National

was at the same time paying similar obligations of Coffman, Dobson & Co. is immaterial, and if it were entitled to consideration at all, it would be an element favorable to the defendants. Both Coffman, Dobson & Co. and the United States National were *paying out* money on each other's account. Neither was *receiving* any money on the other's account. It cannot be argued, then, that in some vague way the United States National Bank received the benefit of the amount which Coffman, Dobson & Co. owed the United States National in any other way than that the Coffman bank paid certain obligations of the United States Bank. But this, under all the authorities, is insufficient to constitute a trust.

2. As to the Security State Bank of Chehalis transaction: This involved two checks amounting to $5363.06. The United States Bank owed the Security Bank considerably more than that amount, and the United States Bank therefore merely credited itself upon its own books with the amount of these checks. It used them to pay a debt of its own. This is the simplest situation which the case at bar presents. The first indispensible prerequisite of the establishment of a trust is lacking, namely, any augmentation of assets.

3. As to the Bank of California transaction: This involved approximately $9,000, and presents precisely the same legal situation as the Coffman, Dobson transaction. It was affirmatively shown that a substantial amount of the credit of the United States National with the California bank went to pay depositors of the United States National. As to the remainder of the fund, the record, so far as it speaks at all upon the subject, shows that it was expended in the payment of other of the debts of the United States National Bank. If the record were entirely silent upon these matters, complainant must fail, because the burden is upon her to trace the trust fund, either in the orig-

inal or some substituted form, into the assets which passed to the receiver.

The fact that the California bank was a reserve bank for the United States Bank is immaterial. If evidence be needed on this question, Mr. Stacy's testimony shows that the relation between banks in such circumstances is purely that of debtor and creditor. The reserve bank does not hold a fund sacredly set aside from the balance of its assets, but is merely a debtor to the amount of the reserve fund deposited with it. As expressed in Section 5192 of the Revised Statutes, 5 Fed. Statutes Annotated, p. 125, it is merely a 'balance due' from one association to another. Precisely the same principles apply as would obtain in case the trust fund had been traced into the hands of a private individual.

The legal effect of all of the foregoing transactions is therefore that the proceeds of Mrs. McCormick's warrants were used in paying the debts of the United States National Bank. Counsel for complainant answers this argument by saying that it is presumed that the United States National Bank used its own funds for the purpose of paying its debts. This presumption is not to be indulged in where the record conclusively proves the contrary. Counsel points to the fact that at the various dates mentioned United States National Bank had more than enough cash in its vaults to pay the complainant's claim. *That would be material if the complainant's fund had been traced into the vaults of the bank.''*

It will thus be noted that counsel for the receiver take the position that appellee is not entitled to recover because her moneys had not been "traced into the vaults of thte bank." We suppose by this that counsel means that the money received by the Centralia Bank on the checks of the County Treasurer

of Lewis county in payment of appellee's school warrants was not actually placed in the vaults of that bank. If this be their contention, then it is met and answered by the decision of this Court in the case of *Merchants National Bank vs. School District No.* 8, 94 Fed., 707. And also in the decision of the United States Supreme Court in the case of *Commercial National Bank vs. Armstrong,* 148 U. S. 50-58, 37 L. Ed., 363, where the court, speaking through Justice Brewer, said:

> "We also agree with the Circuit Court in conclusions as to those moneys collected by sub-agents to whom the Fidelity was in debt, and which collections had been credited by the sub-agents upon the debts of the Fidelity to them before its insolvency was disclosed, for there the money had practically passed into the hands of the Fidelity, the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents; *it was the same as though the money had actually reached the vaults of the Fidelity.* * * * * *"

In *Merchants National Bank vs. School District, supra,* this Court, in speaking of the same identical proposition, said:

> "The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received."

See also:

Montague vs. Pacific Bank, 81 Fed., 602;

Moreland vs. Brown, 86 Fed., 257;

Brenam vs. Tillinghast, 201 Fed., 609;

Massey vs. Fisher, 62 Fed., 958;

Myers vs. Board of Education, 32 Pac., 661;

Peak vs. Ellicott, 1 Pac., 499;

Capital National Bank vs. Coldwater National Bank, 69 N. W., 115;

First National Bank vs. Hummel, 23 Pac., 989;

Anderson vs. Pacific Bank, 44 Pac., 1063;

San Diego County vs. California National Bank, 52 Fed., 59.

In view, then, of the decision of this Court in *Merchants National Bank vs. School District, supra,* and of the United States Supreme Court in *Commercial National Bank vs. Armstrong, supra,* we can safely assert that it is not indispensible to the success of appellee that she show that her moneys so received by the Centralia bank were actually deposited in its vaults. It is the theory of counsel for the receiver that unless this was done she cannot recover. As the fallacy of a proposition can best be shown by distorting it, we may presume that had the Centralia bank taken appellee's money and actually deposited it in its own vaults, then there would, in view of the fact that at all times thereafter the bank had on hand and in its vaults a sum of money largely in excess of the amount received by it belonging to the complainant, be no question as to her right to a preference. But, argued counsel for the receiver in the lower court, the Centralia bank deposited complainant's money with its correspondents and reserve agents and afterwards checked out the same in payment of its debts to its depositors; and therefore appellee's rights to a preference cannot be sustained because, to use the language of counsel for receiver, "the first indispensible prerequisite to the establishment of a trust is lacking, namely, any augmentation

of assets." In other words, a trick in bookkeeping by the officers of the bank is all that is necessary to defeat her right to a preference. It is just such absurd technicalities as indulged in by counsel for the receiver that often bring odium and reproach upon the administration of the law.

We are all familiar with that masterpiece of Mother Goose, wherein she traced the extermination of vermin in Jack's house to causes so remote as the crowing of cocks and the milking of cows. No doubt counsel for the receiver are inspired with the same genius as this great poetess, when they argue that appellee is not entitled to a preference unless she can show the indentical money received by the bank for her use use was ear-marked, tagged and actually deposited in its vaults. One is just as reasonable as the other, and of the two, the former will find more supporters.

Moneys of appellee received by the Centralia bank, deposited by it with Coffman, Dobson & Company and the Bank of California, were withdrawn by the Centralia bank in the usual course of business. This is admitted by counsel for the receiver. This is tantamount to admitting that the Centralia bank received appellee's money in the due course of business, and this being true, it will be deemed to have diverted from its own funds in the bank an amount equal thereto, and to have placed the same to the credit of appellee.

Merchants National Bank vs. School District, supra.

National Bank vs. Insurance Co., 104 U. S., 54.

As we have noted, a similar state of facts confronted this Court in the Merchants National Bank case just cited. Counsel for the receiver in that case contended the school district was not entitled to a preference because "the money was never actually deposited with the Helena Bank." In answer to that contention this Court said:

> "The Helena Bank, if it had not then the money in its actual posession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer, or to the school district. Instead of so paying the money, it chose to enter into an arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank."

In the case of *Brennan vs. Tillinghast*, 201 Fed., 609, it appears from the statement of facts in that case that the complainant borrowed from the First National Bank of Ironwood, Michigan, the sum of $1,000.00, and at the same time deposited with the bank as collateral for his note some 200 shares of the capital stock of the Arizona Copper Company. Afterwards Brennan deposited with the Ironwood bank the sum of $1,000, for which he received a certificate of deposit. "This deposit," says the court, in its opinion, "was received by the cashier of the bank with the understanding at the time that it was to be used in paying Brennan's note at maturity." Thereafter the Ironwood bank, without the knowledge or consent of Brennan, sold 195 shares of the stock of the copper company which it held as collateral to his note, receiving therefor the sum of $3,558.75, and thereupon it deposited that amount in the City Na-

tional Bank of Duluth, Minnesota, to its credit. At the time of this deposit the Ironwood Bank had a pre-existing open account with the Duluth Bank. Against this account it drew its drafts in the usual way, until its credit with the Duluth Bank was exhausted, and on May 11, 1909, the Ironwood Bank owed the Duluth Bank a sum in excess of $1,000.00. The Ironwood Bank closed its doors on June 21, 1909, with a sum of money in its vaults in excess of $8,000.00. On this state of facts its was held that Brennan was entitled to a preference for the amount of his claim over the common creditors of the Ironwood Bank. We excerpt from the opinion the following pertinent quotation:

> "It is undisputed that the proceeds of the sale of the Brennan stock, wrongfully converted by the Ironwood Bank to its own use, constituted a trust fund, which did not lose this character when mingled with other moneys of the bank, and that Brennan was entitled to recover the amount thereof as a preferred claim, if, and to the extent that, he sustained the burden of proof of tracting this money, either in its original shape or in a substituted form, into the moneys which came into the hands of the receiver as part of the assets of the bank. * * * And proof that the tort-feaser has mingled the trust funds with his own and made payments thereafter out of the common funds, is, nothing else appearing, a sufficient identification of the remainder of that fund coming into the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling, as trust property, under the legal presumption that he regarded the law and neither paid out the trust fund, nor invested it in other property, but kept it sacred."

Upon the hearing in the lower court it was

argued by counsel for the receiver, and the same argument will no doubt be made in this court, that the cash assets of the Centralia Bank were not increased in the hands of the receiver by the receipt of moneys of appellee, and hence there could be no recovery. What mental process was employed to arrive at this result we are at a loss to determine. The trust fund became a part of the money assets or cash fund of the Centralia bank, and was a part of this fund when the bank failed.

Empire State Surety Co. vs. Carroll County, 194 Fed. 593, 605;

Perry on Trusts, Secs. 828, *et seq.;*

City of Centralia vs. U. S. National Bank, 221 Fed., 755;

National Bank vs. Insurance Co., 104 U. S., 54-66;

Erie R. Co. vs. Dial, 140 Fed., 689.

In *City of Centralia vs. U. S. National Bank, supra,* speaking to this identical proposition, the court says:

"The fact that the correspondent bank collected the purchase price of the bonds and gave the United States National Bank credit, not remitting coin or currency, in principle does not change the rule. The correspondent bank was the agent of the United States National Bank and an authorized reserve bank. The agent's possession was possession of the principal. If the National Bank of Commerce had remitted the United States National Bank by draft on New York or Chicago, it would not, thereby, any more nearly have gotten the actual money collected into the vaults of the United States National Bank than was done by the National Bank of Commerce giving the United States Bank credit, which was drawn against by the latter in the regular course of business.

"The cash items, including cash, handled daily by a bank, constitutes a particular fund, aside from its general assets and property. It is recognized as a separate fund by section 5191 R. S. (5 Fed. State Ann., 124). A fund of this character is so liquid in its nature that a trust fund once traced into it, the attempt, unaided by presumption, to separate it from the mass is as futile as to pick a wanted coin from a bag of its fellows. The money being received and the credit given by the treasurer, the proceeds of these bonds entered into this cash fund of the United States National Bank, and thereafter, in expending money from this fund, whether paid out over the bank's counter in Centralia, or by draft, or check, on the Seattle correspondent and reserve bank, or upon any of its other correspondents and reserves, to which it may have shifted its credit in the National Bank of Commerce, the presumption would be that such expenditure was from the bank's money, and that the trust fund remained untouched, as much so as though the money were taken from one stock or another of coin upon the bank's own counter.

"With the constant and daily shifting of cash credits and balances, forth and back, and between the bank and its correspondents, there is no more of a presumption that the trust fund remained with the correspondent bank until wiped out by the overdraft than there would be if it were traced, with other money, into a particular drawer on entering the bank, (one of a number of drawers into which coin was daily placed and from which it was as often taken), which particular drawer was found empty upon the bank's failure—that it had been lost and dissipated, though money remained in the other drawers. Neither the rule in *San Diego County vs. California National Bank* (C. C.) 52 Fed. 59, nor that in *Multnomah County vs. Oregon National Bank* (C. C.) 61 Fed. 912, is opposed to the present holding, and it is not clear

that either of those cases is opposed to the holding of the other. Each of them was determined on demurrer."

See also:

Widman vs. Kellogg, 133 N. W. 1020, 39 L. R. A., N. S., 563;

Anheuser-Busch vs. Morris, 36 Neb., 31, 53 N. W., 1037.

But all other questions to the contrary, we insist that neither the bank nor its receiver should now be heard to assert that it paid out its money belonging to complainant, instead of its own money. Commenting upon this proposition the Supreme Court of North Dakota said:

"And why, we ask, should the bank, or the receiver standing in its stead, be heard to assert as against the rightful owner of moneys, that in paying creditors of the bank it paid money that belonged to appellant, and which it held in a trust capacity, instead of paying its own money? To hold that the bank may take such a position, and maintain it in a court of equity, seeking to do equity, would be to permit the bank to take advantage of its own wrong, for its own benefit, and to the detriment of the innocent party it has injured."

In view of the decision of this Circuit in *Merchants National Bank vs. School District, supra,* we do not feel called upon to pursue the subject at any further length.

The decree entered in the court below should be affirmed.

Respectfully submitted,

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